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No. 98-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

vs.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether private plaintiffs' action became moot on appeal, due to redressability, where the only potential relief available was civil penalties payable to the U.S. Treasury.

2. Whether private plaintiffs are entitled to recovery of attorneys' fees or other litigation costs when they are not the prevailing or substantially prevailing party.

STATEMENT PURSUANT TO RULE 29.6

Laidlaw Environmental Services (TOC), Inc. is a wholly-owned subsidiary of Laidlaw Environmental Services, Inc. which is a publicly traded and held corporation. Laidlaw Environmental Services, Inc. is now known as Safety-Kleen Corp., and Laidlaw Environmental Services (TOC), Inc. is now known as Safety-Kleen (Roebuck), Inc. Neither Safety-Kleen Corp. nor Safety-Kleen (Roebuck), Inc. has any nonwholly owned subsidiaries.

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OPINIONS BELOW AND JURISDICTION

The petition accurately sets out the opinions below and the grounds for jurisdiction. Laidlaw adds that on November 18, 1998, the petition was placed on the docket and on December 10, 1998 Laidlaw was granted an extension of time to file its brief in opposition to the petition.

STATEMENT OF THE CASE

Laidlaw is a South Carolina corporation which owns and operated a hazardous waste incinerator in Roebuck, South Carolina.[1] Joint Appendix (hereinafter "JA") p. 118. As part of this facility, Laidlaw operated a wastewater treatment plant that discharged treated wastewater into the North Tyger River. *Id.* This wastewater treatment process and the wastewater discharge were regulated by a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). *Id.*

When Laidlaw purchased the facility in early 1986, a NPDES permit was in place, and Laidlaw operated under this permit until the end of 1986. *Id.* On December 15, 1986, DHEC issued Laidlaw its own NPDES permit effective January 1, 1987 covering the facility's wastewater treatment plant. *Id.* This permit regulated the discharge amounts of various metals, including mercury, and the flow, temperature, toxicity, and pH of the facility's wastewater discharge. *Id.* at 118-119.

Laidlaw's 1987 permit drastically reduced the daily maximum mercury limit from 20 parts per billion ("ppb") to

1. In August 1998, Laidlaw closed its facility in Roebuck. The hazardous waste incinerator and waste-water treatment plant are no longer in operation.

1.33 ppb. JA p. 119. Because of this drastic reduction in the mercury limit, DHEC imposed an interim mercury limit of 10 ppb for 1987, with the 1.3 ppb limit becoming effective on January 1, 1988. In connection with the interim limit, DHEC required Laidlaw to conduct a feasibility study to determine if technology even existed that would allow Laidlaw to comply with its mercury limit of 1.3 ppb. *Id.* at 119-120. In addition, DHEC provided a "reopener" clause in the permit allowing Laidlaw to petition for a higher mercury limit based upon the results of the feasibility study. *Id.*

Ultimately DHEC determined that Laidlaw's mercury limit was unnecessarily low and resulted from an erroneous calculation. JA p.127. DHEC raised Laidlaw's daily maximum mercury limit to 10 ppb in the reissued permit, but, unfortunately, Laidlaw was burdened with a "draconian" mercury limit of 1.3 ppb during the relevant period of this citizen suit. *Id.* at 122.

Despite facing a daunting task in complying with a mercury limit of 1.3 ppb, Laidlaw diligently and determinedly sought a solution that would allow compliance. As early as August 1986, Laidlaw contacted Environmental Technology Engineering, Inc. ("ETE"), an environmental consulting firm, to conduct a feasibility study to determine what, if any, technologies could achieve the 1.3 ppb mercury limit. *Id.* at 120. ETE evaluated eight possible technologies, bench tested two of the eight, and eventually concluded that compliance with the 1.3 ppb mercury limit was "an extremely difficult and complex problem" and that "there is no inexpensive method to effectively remove mercury to the proposed [1.3 ppb] limit and the technology is still being developed." *Id.* at 120, 151. Despite such a bleak outlook, Laidlaw did not seek a higher mercury limit under the 1987 permit's reopener clause, but instead followed ETE's recommendation to install a second carbon adsorption unit. *Id.*

at 151. To Laidlaw's disappointment, the additional carbon adsorption unit did not enable Laidlaw to consistently achieve the 1.3 ppb mercury limit. *Id.* at 121.

In September 1988, Laidlaw and DHEC entered into a consent order, in response to which Laidlaw contracted with another environmental consulting firm, RMT, Inc., to fully reevaluate Laidlaw's wastewater treatment system. *Id.* RMT investigated four conceptual approaches to treating Laidlaw's wastewater, and in December 1988, recommended bench testing three metals removal systems. *Id.* These systems were tested in 1989, and Laidlaw chose the Lancy system. *Id.* Also in 1989, Laidlaw applied for and received DHEC's approval to replace the facility's two existing cooling towers with a single, more advanced cooling system. *Id.*

The Lancy system was constructed and installed in late 1990 and early 1991 as allowed by a critical construction permit issued by DHEC. *Id.* at 122. Indeed Laidlaw could not have installed control equipment prior to receipt of a construction permit from DHEC. Further, the Lancy system successfully removed all metals to NPDES permit limits with the exception of mercury. *Id.* Despite positive trial test results, Laidlaw continued to experience problems with meeting the extremely harsh mercury limit of 1.3 ppb. Laidlaw worked with both DHEC and the Lancy system manufacturer to "make operational adjustments to the system in an effort to achieve compliance with the mercury limit." *Id.* The manufacturer's engineers recommended adding varying amounts of iron sulfate, copper sulfate, and free sulfide to the Lancy system in an effort to reduce the mercury content, but this effort was unsuccessful. *Id.*

During the entire process, Laidlaw was ever vigilant in ensuring that its wastewater discharges were causing no environmental harm. Between 1986 and 1994, Laidlaw conducted semi-annual acute and chronic toxicity studies on macro invertebrates in the North Tyger River. *Id.* at 133. The studies

confirmed that Laidlaw's wastewater discharges were causing no environmental harm to the receiving river. *Id.*

Throughout 1992, Laidlaw experimented with various operational changes to the system and performed tests using chemicals and technologies both recommended by its consultants and developed internally by Laidlaw personnel. *Id.* at 123. Laidlaw even shut down its incinerator altogether for substantial periods of time in 1992 in an extraordinary effort to avoid violating the consent order with DHEC which remained under the jurisdiction of the state court until August 1993. *Id.* at 123-124.

After years of effort, Laidlaw achieved compliance with the mercury limit by adding carbon filters to the end of the Lancy system and by severely limiting the feed rate of mercury-containing waste into the incinerator well below the levels allowed under the operating authority for the incinerator. *Id.* at 124.[2]

Laidlaw took numerous steps to enable its facility to achieve compliance with an exceedingly stringent mercury limit. The district court characterized Laidlaw's efforts as follows:

> Laidlaw acted in good faith in relying on qualified environmental consultants to recommend the appropriate technology to solve its wastewater treatment problems. Laidlaw's good faith desire to achieve NPDES compliance is further evidenced by

2. Laidlaw could not meet the 1.3 ppb mercury limit using normal mercury feed rates as allowed under interim status and the U.S. EPA HSWA permit. This cost Laidlaw revenue because it could no longer send certain wastes to its Roebuck incinerator. Testimony of Dale Fentress, JA pp. 258-259.

> the fact that, after spending more than $1 million on consultants and new wastewater treatment equipment that did not result in compliance, Laidlaw ultimately found the solution through the efforts of its own personnel experimenting with different technologies combined with restricting mercury feed to the incinerator.

Id. at 148.

The petitioners[3] boldly assert that their citizen suit brought Laidlaw into compliance with its NPDES permit and that "Laidlaw took the actions the suit was designed to effectuate." Plaintiffs' Petition For A Writ Of Certiorari, (hereinafter "Pet.") p. 25. In reality, by the time plaintiffs filed suit on June 12, 1992, Laidlaw had been working toward a solution regarding its mercury limit for over five years. Further, by June 12, 1992, Laidlaw was on the verge of achieving compliance with the mercury limit of 1.3 ppb by adding activated carbon filters to the end of the Lancy system. JA p. 124. Plaintiffs' involvement did nothing more than divert Laidlaw's attention and resources and perhaps even slowed the process somewhat. Nonetheless, Laidlaw was successful in achieving its goal of compliance with its NPDES permit. *Id.* at 137-138.

The plaintiffs' action was tried on the merits from July 31 through August 2, 1995, and the district court issued its second opinion on January 21, 1997. JA pp. 115, 117. Significantly the district court found that between June 1992 and the issuance of the second opinion, there had been only one alleged monitoring violation and during the same period, zero reporting violations. *Id.* at 152. Further, the district court found that

3. Laidlaw does not agree that there should be three petitioners in this case since two — CLEAN and the Sierra Club — failed to serve 60 day notice letters.

Laidlaw had been in substantial compliance with all parameters in the 1987 permit since at least August 1992, some three years before the case was tried. The district court found also that the single mercury excursion in 1994 and in 1995 occurred even though no mercury was being fed into the incinerator. *Id.* at 152. The district court denied plaintiffs' request for injunctive relief because there was a lack of demonstrated harm to the environment and the fact that "Laidlaw is now and has for an extended period of time been in compliance with its [NPDES] permit." *Id.* at 156.

In accordance with Section 309(d) of the Clean Water Act, the district court considered six factors in determining whether a civil penalty should be assessed in addition to the $100,000 penalty that Laidlaw paid to DHEC. *Id.* at 135. In considering the lack of seriousness of the violations, the district court concluded that

> Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no direct environmental impact. There has been no demonstrated proof of harm to the environment.

Id. at 137.

In fact, in considering the history of the violations, the lack of seriousness of the violations, Laidlaw's good faith compliance efforts, and other factors as justice may require, the district court determined that a penalty lower than economic benefit was warranted. *Id.* at 135-155. After its thorough analysis of the six factors, the district court was convinced that Laidlaw should not be penalized in an amount equal to the economic benefit of non-compliance. *Id.* at 153-154.

Petitioners and Laidlaw appealed the district court's decision. Prior to oral argument at the Fourth Circuit Court of

Appeals, this Court decided *Steel Co. v. Citizens for a Better Environment,* 523 U.S. __, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Laidlaw stated in its opposition to plaintiffs' motion for additional briefing that the *Steel Co.* decision "is largely irrelevant to the standing issue" before the court of appeals. Second Supplemental Brief For Appellee, May 6, 1998, p.1. Laidlaw reasoned that since petitioners could not satisfy the first prong of the "constitutional minimum" requirements for standing under Article III of the United States Constitution — injury in fact — it was not necessary to reach the third prong of redressability. *Id.*

Applying the reasoning of *Steel Co.*, the court of appeals concluded that petitioners' action is "moot because the only remedy currently available to Plaintiffs — civil penalties payable to the government — would not redress any injury Plaintiffs have suffered." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303, 307 (4th Cir. 1998). The court of appeals vacated the order of the district court and remanded with instructions to dismiss the petitioners' action. *Id.* at 307.

REASONS FOR DENYING THE WRIT

For almost three-quarters of a century, with only minor changes, the certiorari jurisdiction of this Court has been set out in its Rules as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.

Sup. Ct. R. 10. Petitioners claim that the court of appeals decision is inconsistent with this Court's decision in *Gwaltney*

of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 98 L. Ed. 2d 306 (1987) and with other courts of appeal is baseless and does not serve to warrant this Court's exercise of its judicial discretion to grant petitioners' petition.

I.

THE DECISION OF THE COURT OF APPEALS WAS A PLAINLY CORRECT APPLICATION OF THE LAW.

The decision below represented the court of appeals' interpretation of the law of the land as decided by this Court in *Steel Co.* There is no compelling reason to review the court of appeals application of settled law by revisiting this Court's decision in *Steel Co.*

Over the years, this Court has established that the "irreducible constitutional minimum of standing" contains three components — injury in fact, causal connection between the injury and the conduct complained of, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court described these components as a triad comprising the "core of Article III's case-or-controversy requirement." *Steel Co.*, 140 L. Ed. 2d at 233. Redressability refers to a likelihood that the requested relief will redress the alleged injury. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45-46 (1976).

As Laidlaw will discuss later herein, the facts show that the relief requested by petitioners can no longer address their asserted injury. Once redressability is lost, a court loses jurisdiction as well and cannot proceed. When jurisdiction ceases to exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 7 Wall 506, 514 (1869).

Petitioners mention in their petition that citizen groups in various lawsuits have had standing for the purpose of bringing their initial lawsuits. *See* Pet. pp. 8-13. Seemingly plaintiffs fail to grasp or acknowledge that even if standing is met initially, the court does not retain jurisdiction if the case is mooted by subsequent developments. *See Flast v. Cohen*, 392 U.S. 83, 20 L. Ed. 2d 947, 959 (1968).

This Court has described mootness as

> the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 63 L. Ed. 2d 479, 491 (1980) (quoting Monaghan, Constitutional Adjudication: *The Who and When*, 82 Yale L. J. 1363, 1384 (1973)). Just as standing must be maintained at all stages of the litigation, the mootness doctrine requires that "the controversy posed by plaintiffs' complaint be 'live' not only at the time the plaintiff files the complaint but also throughout the litigation process." *Rocky v. King*, 900 F.2d 864, 867 (5th Cir. 1990).

The court of appeals correctly applied the *Steel Co.* rationale to the facts before it. Rather than conflict with this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 98 L. Ed. 2d 306 (1987), the decision below is very much in line with *Gwaltney*. In addressing mootness and its relationship to citizen suits under the Clean Water Act, this Court stated as follows: "Long-standing principles of mootness, however, prevent maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.' " *Gwaltney*, 98 L. Ed. 2d at 323 (citations

omitted). This Court must have envisioned the scenario where the citizen suit would cease to be a valid case or controversy under the Constitution and would be dismissed accordingly. That is especially true where there is no possibility that a wrong will be repeated due to the closure of the facility.

II.

THE DECISION OF THE COURT OF APPEALS CREATED NO INCONSISTENCY AMONG CIRCUITS BUT MERELY FOLLOWED THE DECISION IN *STEEL CO.*

Petitioners' petition addresses numerous topics, but the issue central to the decision below and *Steel Co.* relates to the redressability of civil penalties. Petitioners first point to six courts of appeals for the proposition that penalties in citizen suits under the Clean Water Act are not moot even though claims for injunctive relief were not viable because defendants had brought themselves into compliance. Pet. p.13. Each of these decisions was decided before and without benefit of this Court's decision in *Steel Co.*

Were it not for *Steel Co.*, the court of appeals might have been the seventh court of appeals to have addressed penalties in a fashion similar to the six courts of appeal mentioned above. In *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988), the Fourth Circuit Court of Appeals held that because "penalties can be an important deterrence against future violations" they could redress a private plaintiff's injury even though the money damages awarded were payable to the U.S. Treasury. *See Student Public Interest Research Group, Inc. v. AT & T Bell Laboratories*, 617 F. Supp. 1190, 1200-1201 (D.N.J. 1985). The court of appeals recognized that "because Steel Co. constitutes 'a superseding contrary decision of the Supreme Court,' we are required to follow it." *Friends of the Earth*, 149 F.3d at 306-307 n. 4.

The court of appeals noted that since petitioners did not appeal the denial of declaratory and injunctive relief,

> the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw which would be paid to the United States Treasury.

Id. at 306; *see Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990). Civil penalties payable to the U.S. Treasury cannot redress any injury suffered by a citizen plaintiff. *See Steel Co.*, 140 L. Ed. 2d at 235. In examining the *Steel Co.* decision, the court of appeals found that this Court reasoned as follows:

> [A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Id. The court of appeals correctly applied the reasoning of this Court and concluded that petitioners' action is moot because "the only remedy currently available to Plaintiff — civil penalties payable to the government — would not redress any injury Plaintiffs have suffered." *Friends of the Earth*, 149 F.3d at 307.

III.

A RECOVERY OF ATTORNEYS' FEES OR OTHER LITIGATION COSTS IS NOT AVAILABLE TO PETITIONERS BECAUSE THEY DID NOT PREVAIL OR SUBSTANTIALLY PREVAIL IN THE ACTION.

In 1987 the Clean Water Act was amended to read that a court

> may award costs of litigation (including reasonable attorney and expert witness fees) to any *prevailing or substantially prevailing party*, whenever the court determines such award is appropriate.

33 U.S.C. § 1365(d) (emphasis added). The court of appeals addressed the issue of awarding costs of litigation to petitioners. *See Friends of the Earth*, 149 F.3d at 307 n. 5.

The court of appeals examined the language of the Clean Water Act mentioned above and noted that an award of costs of litigation is available only to a prevailing or substantially prevailing party. *Id.* The court of appeals next pointed to its decision in *S-1 & S-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994) in which it adopted Judge Wilkinson's dissenting opinion reported at 6 F.3d 160, 168-172 (4th Cir 1993). Judge Wilkinson stated plainly in his dissent the following:

> I do not understand how moot lawsuits, in which the possibility of relief against a party is by definition foreclosed, continue nonetheless to function . . . for the recovery of attorneys' fees.

6 F.3d at 170. In adopting Judge Wilkinson's dissent, the court of appeals held that "the dismissal on appeal of an action . . .

as moot operates to vacate the judgment below . . . and prevents the plaintiffs from being found prevailing parties . . ." *S-1 & S-2*, 21 F.3d at 51 (internal citations omitted). Although *S-1 & S-2* dealt with civil rights issues, the mootness consideration in this case involving the Clean Water Act is the same and should have the same result — no award of attorneys fees or other litigation costs.

Petitioners assert that the decision below and *S-1 & S-2* are inconsistent with decisions in nine other courts of appeal. Pet. p. 24. A review of the ten decisions attributed to nine courts of appeals reveal that they are easily distinguished. First, the issue of mootness was not even involved in seven of the ten cases. Second, in the remaining cases, voluntary action by one of the parties or action of a state environmental agency resulted in the dismissal of the action as mooted. Courts in none of the ten decisions were faced with facts where a plaintiff lacked standing to prosecute a citizen suit because the relief requested could not redress the injury plaintiff had allegedly suffered. *See Steel Co.*, 140 L. Ed. 2d at 232-235.

When confronted with a scenario here strikingly similar to *Steel Co.*, the court of appeals followed this Court's reasoning and concluded that petitioners' action was moot. The court of appeals could do nothing but vacate the order of the district court and remand with instructions to dismiss the action. After all, this Court has noted that

> [w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.

Great W. Sugar Co. v. Nelson, 442 U.S. 92, 60 L. Ed. 2d 735, 736 (1979) (quoting *Duke Power Co. v. Greenwood County*, 209 U.S. 259, 267, 57 S. Ct. 202, 81 L. Ed. 178 (1936)).

Once the court of appeals correctly applied the reasoning in *Steel Co.*, petitioners could not meet the definition of prevailing or substantially prevailing party. If there is no lower court decree in favor of the petitioners, they did not prevail on a single item of relief they sought. Since petitioners did not prevail in the district court, the court of appeals decision is consistent with the Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 121 L. Ed. 2d 464 (1992). While addressing the recovery of attorney fees by a civil rights plaintiff, this Court stated that such a plaintiff "must obtain at least some relief on the merits of his claim." *Farrar*, 121 L. Ed. 2d at 503. It is impossible to bestow the mantle of prevailing party on plaintiffs in the absence of any relief on the merits of their claim.

CONCLUSION

There is no reason for this Court to review any of the issues raised by petitioners. The decision of the court of appeals was a plainly correct application of this Court's decision in *Steel Co.* The petition for a writ of certiorari should be denied.

Respectfully submitted,

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